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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC.,

Appellants,

v.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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December 10, 1984

QUESTIONS PRESENTED

1. May a State taxing Statute impose an unequal tax burden on airlines as opposed to other common carriers without violating the equal protection provisions of the United States Constitution?

2. May a State taxing Statute impose a burden on interstate commerce if that burden is not "properly apportioned" to instate activities and if that burden is not "fairly related" to the taxed activity?

PARTIES TO THE PROCEEDING

Northeastern International Airways, Inc., a Pennsylvania corporation, has no affiliates or partially owned subsidiaries.

Arrow Air, Inc., a Delaware corporation, is affiliated with International Air Leases, Inc., Bach-Air, Inc., Del-Air, Inc., and Aircraft Leasing Inc.

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No. _____

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC.,

Appellants,

v.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

Northeastern International Airways, Inc. and Arrow Air, Inc. appeal from a Judgment of the Supreme Court of the State of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida (Northeastern International Airways, Inc. and Arrow Air, Inc. v. Department of Revenue), (Case Number 64,085) is reproduced at App.1a. It will appear as _____ So.2d _____ (Fla.1984). The companion cases referred to in that opinion are likewise reproduced as follows: Delta Air Lines, Inc. v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,915, App.22a; Eastern Air Lines, Inc. v. State of Florida, Department of Revenue, ____ So.2d ____ (Fla.1984), Case Number 63,949, App.53a; The opinion of the Trial Court is not reported, it is reproduced at App.6a.

JURISDICTION

i

This appeal is from an Order of the Supreme Court of the State of Florida denying Appellants' timely Motion for Rehearing. The Florida Supreme Court upheld the validity, against Appellants' constitutional challenges, of Senate Bill 8A (Chapter 83-3, Laws of Florida).

ii

The date of the entry of the Judgment or Decree sought to be reviewed (the Order of the Supreme Court of the State of Florida denying Appellants' timely Motion for Rehearing) is September 12, 1984. Appellants' timely filed Motion for Rehearing concerned an Order of the

Supreme Court of the State of Florida entered June 14, 1984. The Notice of Appeal to this Court was filed with the Clerk of the Supreme Court of the State of Florida on December 6, 1984.

iii

This appeal is taken pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, §8, United States Constitution:

The Congress shall have Power To . . . regulate Commerce . . . among the several States . . .

Fourteenth Amendment, United States Constitution:

. . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Senate Bill 8A (Chapter 83-3, Laws of Florida):

(CODING: Words in struck through type are deletions from existing law; words underlined are additions.)

§212.08, Fla.Stat.

> Sales, Rental, Storage, Use Tax; Specified Exemptions.--The sale at retail, the rental, the use,

the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this Chapter.

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.--Also exempt are water (not exempting mineral water or carbonated water), and, all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein., ~~and~~ Motor fuels and special fuels ~~on which a tax is imposed by chapter 206 or chapter 207~~ are taxable as provided in part II. ~~All other fuels are taxable~~, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission ~~or by the Civil Aeronautics Board~~ to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in

interstate or foreign commerce are taxable under this part only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier during the previous fiscal year of the carrier, such ratio to be determined at the close of the carrier's fiscal year. This ratio shall be applied each month to the total purchases made in this state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter."

§212.70(3)(a)(b)(c), Fla.Stat.

(3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price

by the percentage change in the average monthly gasoline price commponent of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

STATEMENT OF THE CASE

Appellants, NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC., (both domestic U.S. corporations) are scheduled air carriers operating pursuant to operating certificates issued by the Federal Aviation Administration pursuant to 14 CFR, Part 121. Both Appellants maintain their principal place of business in the State of Florida and carry on their scheduled air carrier operations throughout the United States.

On March 1, 1983, a proclamation was issued by the Executive Department of the State of Florida, which provided in part that "the improvement of Florida's roads, bridges and highways

require increased funding and related statutory changes . . ." This proclamation is reproduced at App.84a. Based on this proclamation and the authority of Fla.Const.art.III, §3, the Governor of the State of Florida convened a special legislative session to consider this proposed funding. During this special session the legislature of the State of Florida ultimately approved Senate Bill 8A which became Chapter 83-3, Laws of Florida. Senate Bill 8A, among other things, altered the statutory scheme of taxation within the State of Florida in the following respects which are germane to this appeal:

1. Motor fuel and special fuels were historically taxed under Chapter

206, Fla.Stat., at the rate of 8¢ per gallon. The first 4¢ of the motor fuel tax had been identified as the First gas tax (§206.41(4)(a), Fla.Stat.), which funds have been committed exclusively to road construction and maintenance. (§206.45, Fla.Stat. and §206.46, Fla.Stat.). Likewise, the first 4¢ of the special fuel tax had been committed for the same purpose (§206.85, Fla.Stat. and §206.875, Fla.Stat.). Senate Bill 8A removes the First gas tax and the corresponding portion of the special fuel tax and imposes a five percent sales tax on motor fuel and special motor fuel under Chapter 212, Fla.Stat. However, the sales tax on fuel is not based upon the actual purchase price of the fuel, but

is based upon a pre-determined price of $1.148 per gallon.

This sales tax is not levied upon any common carrier except airlines due to a specific exemption in the Statute. These other common carriers continue to be taxed under Chapter 206 as before Senate Bill 8A.

2. Prior to the passage of Senate Bill 8A, all interstate and foreign common carriers (except motor carriers), (that is, railroads, vessels and airlines), paid a sales tax on the fuel purchased in Florida computed upon the prorated formula of §212.08(4), Fla.Stat. That formula was based upon a ratio of the intrastate mileage to the interstate or foreign mileage traveled by the carrier during the pre-

vious fiscal year. The net affect of this proration was to tax the interstate common carrier on motor fuel used within the State and to provide an exemption for the tax on motor fuel used outside the State. Senate Bill 8A removes the prorated formula for airlines only while continuing the prorated treatment reflecting intrastate consumption for all other interstate and foreign common carriers. That is, there is no proration of the fuel sales tax paid by airlines such as Appellants. Additionally, the tax on airlines is based upon the predetermined price of $1.148 per gallon, while the tax to railroads and vessels is based upon the actual sales price of their fuel.

3. Although Senate Bill 8A was to provide funds for transportation purposes, the funds are not being utilized for the construction of airport and airport facilities. Airport and airport facilities continue to be funded by the issuance of general revenue bonds. These bonds are redeemed by sinking funds generated though user fees (primarily landing fees), service fees, fuel surcharges and lease payments by the occupiers of the airports. In other words, the bonds are paid for by the airlines. For example, the $265 Million improvements presently being made at the Fort Lauderdale-Hollywood International Airport (the base of operations of Appellant Northeastern) are funded by a bond

issue. Appellant, Northeastern, has guaranteed the payment of those bonds along with the other occupiers of the airport. The bonds will be paid by increased landing fees and lease payments for space. The requirement of a guaranty by the occupiers of the airport was necessary as, without such guaranty, the underwriters would not have been able to market the bonds. Senate Bill 8A makes no change in this existing method of funding airport improvements.

Senate Bill 8A (Chapter 83-3, Laws of Florida) was signed into law by the Governor of the State of Florida on March 8, 1983, several days after the commencement of the special session. On March 11, 1983, the Appellant,

NORTHEASTERN INTERNATIONAL AIRWAYS, INC. brought an action in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (Case Number 83-05136 CA), which action sought declaratory relief with respect to the constitutionality of Senate Bill 8A (Chapter 83-3, Laws of Florida). The Trial Court ruled that Senate Bill 8A (Chapter 83-3, Laws of Florida), did not violate any provision of the United States Constitution. This determination of the Trial Court was challenged in the Supreme Court of the State of Florida which upheld the constitutionality of the portions of Senate Bill 8A which are challenged in this appeal.

The Florida Supreme Court did

strike from Senate Bill 8A a portion of that law granting a "credit" under the Florida income tax to certain Florida based air carriers. The Florida Supreme Court determined that portion of the Statute to be unconstitutional. That portion of the Florida Supreme Court's ruling is not challenged by Appellants in this appeal.

This appeal involves the same issues as are contained in Delta Airlines, Inc. v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,915, App. _____a, and Eastern Air Lines, Inc., v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,949, App. _____a. In both of the above cases,

Notices of Appeal have been filed with the Supreme Court of Florida to this Honorable Court. As the identical issues are presented by the above cases as are presented in this instant appeal, Appellants adopt by reference the Jurisdictional Statements submitted by Appellants, Delta Airlines, Inc. and Eastern Air Lines, Inc. as a part of this Jurisdictional Statement.

REASONS SUPPORTING PLENARY CONSIDERATION

Appellants challenge the constitutionality of Senate Bill 8A (Chapter 83-3, Laws of Florida) on two fronts. Firstly, Senate Bill 8A contains an unlawful and unconstitutional discrimination against Appellants and in favor of other common carriers in two respects. They are that other common carriers are permitted an exemption from the tax for their fuels which are purchased in the State of Florida, but consumed outside the State of Florida, and second, that the fuel utilized by other common carriers is, in effect, taxed at a different rate. Appellants maintain that the classification between themselves as airlines and other common carriers is arbitrary, unreaso-

nable, and furthers no legitimate State interest.

Secondly, Appellants show that Senate Bill 8A places an impermissable burden on interstate commerce contrary to the teachings of Complete Auto Transit v. Brady, 430 U.S. 274 (1977). This unconstitutional burden on interstate commerce is demonstrated in two ways. First, the tax is not "properly apportioned" to local activities within the taxing State, and secondly, the tax is not "fairly related" to the taxed activity.

The Florida Supreme Court in dealing with the constitutionality of Senate Bill 8A upholds the Statute, finding first that the classification between airlines and other common

carriers is appropriate because of an airline's "distinctive nature." This "distinctive nature" is the basis for the Florida Supreme Court's rejection of Appellants' equal protection arguments. Implicit in the Florida Supreme Court's reasoning is that there are "classifications" between the various common carriers, but that the classifications are justified.

The above reasoning of the Florida Supreme Court then becomes more difficult to fathom when the Florida Supreme Court upholds the Statute against a commerce clause challenge by indicating that the tax is "non discriminatory" and that "all purchasers" of fuel are taxed similarly.

The same facts cannot support the conclusion that first there is a rational classification between airlines and other common carriers and then also support the conclusion that there is no difference in the treatment of airlines and other common carriers when they are purchasing fuel.

I

Senate Bill 8A Establishes an Unconstitutional Classification Between Airlines and Other Common Carriers Both in the Imposition of the Tax and in its Method of Computation.

The Florida Supreme Court, in upholding Senate Bill 8A against Appellants' equal protection challenges opined that the classification created by the Statute was not hostile or oppressive and that the classification made by Senate Bill 8A is not

arbitrary. Clearly, a classification, in order to pass constitutional muster, must not be arbitrary and must rest upon a rational basis which promotes a legitimate State interest. Allied Stores of Ohio v. Bowers, 350 U.S. 522 (1959), and Western and Southern Life Insurance Company v. State Board of Equalization, 451 U.S. 648 (1981).

The classifications challenged by Appellants are twofold. Firstly, under the taxing scheme previously in existence under the State of Florida, tax on fuels such as those used by Appellants and other common carriers were assessed based upon a ratio of the number of miles traveled by a common carrier both within and without the

State of Florida. This proration, under Senate Bill 8A, continues for all other common carriers except airlines, thereby providing a competitive advantage to carriers which compete directly with airlines. It is submitted that this classification between airlines and all other common carriers is arbitrary and not founded upon the furtherance of any legitimate State interest. Airlines, such as Appellants, compete with all other common carriers for the carriage of persons and property. This competition should not be skewed by levying additional taxes upon one carrier thereby creating a competitive advantage in favor of another. Carriers, whether they be airlines, railroads, trucks or

vessels clearly should be treated equally with respect to the taxes imposed upon the fuels they consume. There is no legitimate State interest permitting a discrimination between and among these carriers.

Secondly, the provisions of Senate Bill 8A create a very subtle classification between the types of fuel utilized by Appellants and all other consumers. This is accomplished under the Statute by levying the tax upon fuels based upon an arbitrarily established price of $1.148 per gallon of fuel. This arbitrary establishment of a tax based upon five percent of $1.148 per gallon appears reasonable and fair on its face, however, the utilization of this arbitrarily

established price of $1.148 per gallon causes jet airplane fuel to be taxed at a much higher percentage than, for example, gasoline. Jet fuel (in reality kerosene) at the time of the consideration of this matter was sold for approximately 90¢ per gallon. unleasded gasoline was selling for a price of approximately $1.30 per gallon at the same time. The effect of taxing both fuels based upon five percent of the arbitrarily established figure of $1.148 per gallon resulted in an actual tax of approximately 4.4 percent and a tax on jet fuel of approximately 6.4 percent. The insidious nature of calculating the tax based upon a percentage of a pre-established price causes airlines in particular to pay a

much higher percentage of sales tax than other purchasers of fuel. Again, this classification against airlines and in favor of all other carriers, creates a competitive advantage in favor of the other carriers to the disadvantage of airlines. There is no rational basis for this classification.

Finally, Senate Bill 8A does not require railroads and vessels to pay the tax based on the arbitrarily adopted price of $1.148, but rather allows those carriers to be taxed based on their actual cost of fuel. This difference between railroads and airlines cannot be justified.

II

Senate Bill 8A Imposes an Unconstitutional Burden Upon Interstate Commerce in that the Tax Involved is not "Properly Apportioned" to Instate Activities

and is not "Fairly Related" to the Taxed Activity.

Senate Bill 8A (Chapter 83-3, Laws of Florida) clearly creates a burden upon interstate commerce. The constitutionality of such burden has been considered by this Court in Complete Auto Transit v. Brady, 430 U.S. 274 (1977), which announced a four-prong test to determine if a State taxing scheme passed constitutional muster when considered in light of the Commerce Clause. The taxing scheme is to be scrutinized to determine the practical effect of the taxing scheme. The taxing scheme adopted by Senate Bill 8A (Chapter 83-3, Laws of Florida) runs afoul of the Complete Auto, Id. test in two respects. They are first, that the tax is not "properly

apportioned" and secondly, that the tax is not "fairly related" to the taxed activity.

One of the tests established in Complete Auto, Id. is that a taxing scheme would not pass constitutional muster if the tax was not "properly apportioned" to local activities within the taxing State. Such an apportionment existed for airlines under the taxing scheme altered by Senate Bill 8A and, continues to exist under the taxing scheme adopted by Senate Bill 8A for all other carriers except the airlines. An apportionment based upon mileage traveled both within and without the State of Florida would satisfy the second test of Complete Auto, Id. Indeed, Senate Bill 8A does

continue that apportionment for all other common carriers. The infirmity in the Statute is that the apportionment has been deleted for Appellants and other airlines similarly situtated. Accordingly, the Statute fails.

Senate Bill 8A, also runs afoul of the fourth aspect of the Complete Auto, Id. Test. That is, the tax imposed upon the airlines for their fuel needs is not "fairly related" to the services provided by the State. The tax levied under Senate Bill 8A falls squarely upon the airline. The services provided by the taxes, on the other hand, are to go to fund the repair of the "accelerating deterioration of (Florida's) transportation system: roads, expressways, bridges and public

transit." Governor's Proclamation, App.84a. and "to fund the construction and maintenance of Florida's transportation system: roads, bridges, expressways and public transit." Preamble to Senate Bill 8A. If a levy is for the general revenue it need not be fairly related to specific services, however, if the taxing statute is designed to raise revenue for a specific (as opposed to general) state need, the tax must be reasonably related to the services provided if such taxes are going to be a burden on interstate commerce. The State cannot arbitrarily impose a user tax upon airlines without regard to the "fairness" of the tax on the taxpayer. Evansville-Vanderburg Airport Authority vs. Delta Airlines,

Inc., 405 U.S. 707 (1972), Commonwealth Edison vs. Montana, 453 U.S. 609 (1981), and Ingels vs. Morf, 300 U.S. 290 (1937).

Accordingly, since this tax is to be used for a special purpose (i.e., repair of roads, bridges, etc.) the tax must be fairly related to the object of the special purpose (repair of roads, etc.). Since the Appellants are airlines they obviously do not use the roads and bridges. Therefore, the relationship required by Complete Auto, is lacking and Senate Bill 8A must fail.

CONCLUSION

For the foregoing reasons, this Court should require plenary consideration of this appeal, with briefs on the merits and oral argument.

Respectully submitted,

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Dated December 10, 1984.

APPENDIX

SUPREME COURT OF FLORIDA

No. 64,085

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., et al., Appellants,

v.

DEPARTMENT OF REVENUE, Appellee.

[June 14, 1984]

ADKINS, J.

We have before us an appeal which results from an order by the Fourth District Court of Appeal certifying the issues involved to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

The case arose with the filing of a complaint in circuit court in Broward County. Northeastern International Airways, Inc., and Arrow Air, Inc., challenged the constitutionality of chapter 83-3, Laws of Florida. The circuit court entered an order of final judgment upholding the constitutionality of chapter 83-3. The plaintiffs challenged the constitutionality of chapter 83-3 but did not argue for exemption on the basis of international agreements entered into by the United States. The circuit court granted a motion for summary judgment against the plaintiffs thereby upholding the constitutionality of the law.

We have dealt with the issues

raised here in our decisions in Eastern Air Lines, Inc. v. Department of Revenue, No. 63,949 (Fla. June 14, 1984); Delta Air Lines, Inc. v. Department of Revenue, No. 63, 915 (Fla. June 14, 1984); Department of Revenue v. Wardair Canada Ltd., No. 64,036 (Fla. June 14, 1984); and Department of Revenue v. Air Jamaica Ltd., No. 64,035 (Fla. June 14, 1984).

Accordingly we affirm in part and reverse in part the order of the circuit court. We determined in Delta that the portion of chapter 83-3 which provided a tax credit to Florida-based airlines was unconstitutional. We also determined that it was severable and that it was stricken from the law. The remainder of the order is affirmed.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON and SHAW, JJ., Concur
McDONALD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal from the Judgment of Trial Court in and for Broward County, Miette K. Burnstein, Judge, Case No. 83-5136 - Certified by the District Court of Appeal, Fourth District, Case No. 83-1587

Thomas F. Luken, Fort Lauderdale, Florida,

for Appellants

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellee

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 83-05136-CA

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., a foreign corporation, and ARROW AIR, INC., a foreign corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Defendant.

FINAL JUDGMENT

This Court has heretofore entered its Order in the above captioned matter granting Motion for Summary Judgment filed by the Defendant and holding that Senate Bill 8A, Chapter 83-3, Laws of Florida was constitutional and valid in

all respects; at the final hearing the parties agreed and stipulated with regard to all evidentiary matters and no other factual matters remain outstanding to be considered by this Court. Whereupon, Final Judgment may now be entered in favor of the Defendant.

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. This Court's Order of date July 1, 1983 is hereby incorporated herein and made a part hereof of this Final Judgment.

2. Senate Bill 8A, Chapter 83-3, Laws of Florida, is hereby found to be constitutional and valid.

3. The Motion for Summary Judgment filed herein by Plaintiffs is hereby

denied.

4. Final Judgment is hereby entered in favor of the Defendant and the Defendant shall go hence without day.

Done and Ordered in Chambers this 22 day of July, 1983.

/S/
MIETTE K. BURNSTEIN
Circuit Judge

Copies Furnished:

Thomas F. Luken, Esquire
Jim Smith, Esquire, Attorney General
Mitchell D. Franks, Esquire
Joseph C. Mellichamp, III, Esquire
Larry Levy, Esquire

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 83-05136 CA

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., a foreign corporation, and ARROW AIR, INC., a foreign corporation,
Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

O R D E R

THIS CAUSE, focusing on the question of constitutionality of Senate Bill 8A, was heard on cross Motions for Summary Judgment.

Senate Bill 8A revises portions of the taxing statutes, Chapters 206, 212, and 220, Florida Statutes,

regarding aviation fuel by: (1) removing previously allowed prorations to interstate air carriers, reducing their sales tax proportionately to miles travelled outside the State while continuing such prorations for other non-highway interstate carriers (2) allowing a one-half offset against State corporate income tax only to air carriers having a corporate office and over 1200 employees within the State, and (3) assessing tax on aviation fuel at 5% on an initial set price of $1.148 per gallon while leaving the tax on other non-highway interstate carriers at 5% of actual sales price.

Plaintiffs, Northeastern International Airways, Inc, and Arrow Air, Inc., both foreign air carriers

with corporate offices, but less than 1200 employees, within the State, claim discriminatory practices in the bill's "arbitrary and unreasonable" classification of non-highway interstate commercial carriers in general, of aviation carriers specifically, and of aviation, as contrasted with other fuels, thus violating the equal protection clauses of the United States and Florida Constitutions. They also claim that Senate Bill 8A constitutes an impermissible taxation of an interstate business so as to violate the commerce clause of the United States Constitution.

Senate Bill 8A expresses the legislative intent of F.S. §212.05 - as a taxation upon "... the privilege of

doing business ..."

and

(1) "For the exercise of such privilege, a tax is levied on each taxable transaction or incident ...".

F.S. §212.70(1) goes on to delineate the manner of imposition:

"... a tax shall be imposed for the privilege of the sale at retail in this state of ... special fuel ... [2a] ... paid upon the first sale or transfer of title within this state ...".

There is little doubt but that this tax is levied upon the privilege of selling aviation fuel (or upon its first withdrawal). It is not a "user" fee levied upon the use of a particular facility or service. It is not such a tax designed to distribute the burden of maintaining a facility among those utilizing that facility such as airport

landing fees.

> "... Florida sales tax, being an excise tax is not subject to the constitutional requirements of equality and uniformity. Rather, the constitutional test to be applied to such a tax is whether the classifications created by such tax are reasonable and not arbitrary". Estate of W. T. Grant Company v. Lewis, et al, 358 So.2d 76 (Fla. 1st DCA 1978).

Plaintiffs urge that the disparity of treatment between non-highway interstate carriers is arbitrary and unreasonable. It would appear, however, that certain tax structures already treat airlines differently, e.g. the exemption from ad valorem taxes on the lease of governmental property pursuant to Chapter 80-368, a generally more favorable situation to air carriers than to other non-highway interstate carriers. While it is true

that air carriers do pay an intangible tax on such leasehold interest such payments are upon the value of the leasehold and arguably substantially less than upon the ad valorem taxes based upon the value of the real property and its improvements. Just Valuation and Taxation League, Inc. v. Simpson, 209 So.2d 229 (Fla. 1968). This disparity of treatment was not challenged by Petitioners.

Defendant argues that the legislature did away with the credit for out-of-state mileage because of air carrier routing over the Gulf or ocean so as to defeat the tax imposed upon mileage travelled within the State. Although this reasoning can also be applied to vessels, it nonetheless implements a

legitimate legislative intent to close a loophole available to air carriers and is therefore another reasonable basis for a separate classification of them.

Plaintiffs assert that even all air carriers are not treated the same because of the corporate tax credit contained in F.S. §220.189 allowed only to air carriers maintaining or establishing "... its corporate or business home office in this state and which maintains a work force within this state or more than 1200 employees".

Defendant argues that such provision is designed to promote intrastate employment and therefore is a legitimate objective of legislature.

The Court is more persuaded by the stipulation of both counsel for Plaintiffs and defendant that no airline has paid a state corporate income tax within the past five years, nor is such tax payment reasonably certain to occur in the immediate future.

> "... one will not be heard to question the constitutionality of a legislative enactment except insofar as he may be able to show that it adversely affects him." Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950).

The Plaintiffs challenge the setting of an "arbitrary" price per gallon of aviation fuel as being violative of due process. The expressed legislative intent to facilitate the collection in a manner least likely to increase public and private costs of tax collection and administration is

set forth in F.S. §212.6C(1).

Utilizing an initial price based upon an average approximation per gallon is a legitimate method of facilitating collection and such procedure is not, on its face, unconstitutional. Such provision applies to all purchasers and users of aviation fuel and thus cannot be said to be oppressively discriminatory. Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla. 4th DCA 1983).

Tax on gas used or sold in the state (including gas imported for use upon its withdrawal from storage tanks) is not an unconstitutional burden on interstate commerce. Edelman v. Boeing Air Transport, Inc., 389 U.S. 249 (1933); Eastern Air Transport v. South

Carolina Tax Commission, 285 U.S. 147 (1932); United Air Lines, Inc. v. Mahin, 410 U.S. 623, 35 L.Ed^2 545, 93 So.Ct. 1186 (1973 Sup.Ct.).

The Plaintiffs, conceding that there are no contested material issues of fact, have failed to meet their heavy burden of proving a taxing statute's unconstitutionality.

In granting the Defendant's Motion for Summary Judgment this Court recognizes the ruling of its sister court: Delta Air Lines, Inc., et al, v. State of Florida, Department of Revenue, #83-761, Second Judicial Circuit In and For Leon County, Florida.

The Defendant's Motion for Summary Judgment be, and the same is hereby,

granted, this 1st day of July, 1983, in Fort Lauderdale, Broward County, Florida.

/S/ Miette K. Burnstein
Miette K. Burnstein,
Circuit Judge

Copies furnished:

Thomas F. Luken, Esquire
Jim Smith, Esq., Attorney General
Mitchell D. Franks, Ewq.
Joseph C. Mellichamp, III, Esq.
Larry Levy, Esq.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 12, 1984

CASE NO. 64,085

Circuit Court Case No. 83-5136
(Broward)

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., et al.,

Appellants,

vs.

DEPARTMENT OF REVENUE,

Appellee.

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
CC: Hon. Robert E. Lockwood, Clerk
Hon. Miette K. Burnstein, Judge

Thomas F. Luken, Esquire
Joseph C. Mellichamp, III, Esquire
Larry Levy, Esquire

SUPREME COURT OF FLORIDA

No. 63,915

DELTA AIR LINES, INC., et al.,
Appellants,

v.

DEPARTMENT OF REVENUE, Appellee.

[June 14, 1984]

ADKINS, J.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Delta Air

Lines in the circuit court of Leon County seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the ground that the law was unconstitutional. Capitol Air, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines and USAir, Inc., were granted leave to intervene as party plaintiffs. On May 27, 1983, the circuit court entered its final judgment in favor of the Department of Revenue ruling the law constitutional. Delta appealed to the First District Court of Appeal which certified the case for immediate resolution by this Court.

We described the structure of chapter 83-3 and resolved some of the issues raised by Delta in our decision in Eastern Air Lines v. Department of Revenue, No. 63,949 (Fla. June 14, 1984). There are two issues which Delta raises which we were not faced with in that decision.

First, Delta raises the issue of whether chapter 83-3 violates the commerce clause of the United States Constitution by providing a corporate income tax credit for Florida-based airlines. Chapter 220, Florida Statutes (1981), imposes an income tax on domestic corporations and foreign corporations qualified to do business in Florida or actually doing business in Florida. Section 61 of Chapter 83-3

creates section 220.189, Florida Statutes (1983), and provides a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state. This credit offsets up to one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

A state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 1977); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). Taxes have been sustained

against commerce clause challenges when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. Complete Auto, 430 U.S. at 279. No state may, consistent with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959). This principle follows from the basic purpose of the commerce clause which is

to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution. Boston Stock Exchange, 429 U.S. at 329; Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

In Boston Stock Exchange the United States Supreme Court found unconstitutional a state stock transfer tax containing credit provisions which had the effect of discriminating against interstate commerce to the direct commercial advantage of local business. The transfer tax was imposed if any one of five events (sale, transfer, delivery, etc.) occurred within the state. The rate of tax was based upon the price of the security. The total tax was determined by the

number of shares involved in the taxable event. The imposition of the tax itself was found to be constitutional. However, the credit structure of the tax was found to be unconstitutional. The credit amendments to the tax resulted in a scheme in which intrastate sales received a preferential fifty percent reduction in the rate of tax imposed and were given a maximum tax ceiling of $350. Out-of-state sales, however, were subject to the full tax rate without any ceiling. Because it imposed a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell "short of the substantially evenhanded treatment demanded by the [c]ommerce [c]lause." 429 U.S. at 332.

Another tax statute whose disciminatory credits and exemptions provided the basis for a finding of unconstitutionality was the Louisiana statute reviewed in Maryland v. Louisiana, 451 U.S. 725 (1981). There, a tax was imposed on certain uses of natural gas coming into the state. The tax was imposed to equalize competition between locally produced gas subject to the state's severance tax and gas coming into the state from the outer continental shelf which was free of the severance tax. The use tax provided an exemption for gas consumed within the state. It also provided a tax credit against severance taxes for all use taxes paid, thereby encouraging investment in local mineral exploration and

development and discouraging investment and development of the outer continental shelf and other states. The Court found the statute unconstitutional in light of the discriminatory effect produced by the pattern of credits and exemptions which violated the principle of equality. 451 U.S. at 759.

The circuit court here found that "the tax is on fuel purchased in the state and all consumers are taxed equally" and thus concluded that there is no burden on interstate commerce similar to that found in Maryland v. Louisiana. The court misconstrued the nature of the discrimination worked against interstate commerce by the corporate tax credit. The question is not one of whether Florida may impose this

tax on fuel purchased in Florida for use in interstate commerce. Rather the issue is whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce. The credit provision of chapter 83-3 clearly discriminates against interstate commerce because the corporate tax credit provides a direct commercial advantage to Florida-based air common carriers over non-Florida-based carriers.

The circuit court also found Boston Stock Exchange inapplicable stating that, in the present case, "the legislature is not trying to tax any out-of-state transactions." The circuit court misconstrued the holding in Boston Stock Exchange. The United

States Supreme Court in Boston Stock Exchange was not concerned with whether the transaction occurred in New York or outside the state, but whether the credit structure of the tax favored in-state business and discriminated against interstate commerce.

The circuit court also relied on Archer Daniels Midland Co. v. State, 315 N.W.2d 597 (Minn. 1982). In Archer Daniels the Supreme Court of Minnesota struck down a tax credit statute similar to the Florida-based tax credit provided in chapter 83-3. Minnesota imposed an excise tax of thirteen cents per gallon on all gasoline sold in the state including gasohol. The taxing statute was amended in 1980 to provide a four cents per gallon partial exemp-

tion for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident alcohol producer challenged the constitutionality of this statute alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The court found that the exemption violated the commerce clause noting that the act attempted to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power. Id. at 599. The circuit court ruled that Arthur Daniels dealt with out-of-state production or consumption and that chapter 83-3 in no way affects out-of-state production or

consumption. This approach again overlooks the real issue in this case. Just as the Minnesota statute favored in-state gasohol producers, chapter 83-3 confers an artificial economic advantage on those interstate air carriers who maintain corporate or business home offices in Florida over those competing air carriers who base their corporate headquarters outside the state.

The circuit court continued its erroneous analysis under the commerce clause by referring to Faircloth v. Mr. Boston Distiller Corporation, 245 So.2d 240 (Fla. 1970), as supporting the proposition that this Court has upheld special tax exemptions to encourage Florida industry. The

court's reliance on Faircloth is misplaced, because that case involved a challenge to a state excise tax based upon equal protection and due process arguments. The commerce clause was not an issue in that case.

The circuit court has misconstrued the analysis necessary to determine whether a statute discriminates against interstate commerce. The test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce. The corporate income tax credit provides a direct commercial advantage to select Florida-based air carriers and thereby violates the commerce clause.

In Eastern, No. 63,949 (Fla. June 14, 1984), we discussed the proper analysis to determine whether a statutory provision was severable from the remainder of the statute. We find that the corporate tax credit provision, now section 220.189 (Florida Statutes 1983), can be logically separated from the remaining valid provisions of chapter 83-3 without hampering the legislature's intent to provide a transportation fund for the state. Thus, we strike that provision which extends a corporate income tax credit to Florida-based air carriers. We believe this will still accomplish the legislature's primary purpose--to tax corporations qualified to do business in Florida or actually doing business

in Florida.

Delta also challenges section 6 of the law as being a road-user tax totally unrelated to the services provided by the state and thus violative of the commerce clause. Delta states in its brief that the first gas tax and the corresponding first four cents of the special fuel tax formerly imposed under chapter 206, Florida Statutes (1981), levied an excise tax specifically on road-users. Delta also refers to the new provision as "the new sales tax." However, the thrust of Delta's argument is that this tax is a user tax and, as such, fails the fourth prong of the text enunciated in Complete Auto. Delta argues that it and other interstate air common carriers do not

use the roads in Florida and, therefore, the measure of the tax bears no relationship to Delta's presence or activities in the state.

We must disagree with Delta's argument. First, the tax is not a road-user tax. It is an excise tax imposed under part II of chapter 212, which is commonly referred to as the sales tax law of the state of Florida. The tax is imposed on the privilege of engaging in certain businesses, including the selling of motor fuels and special fuels in the state. All purchasers of motor fuel or special fuel are taxed on the incident of first withdrawal. The funds generated are to be deposited in a state transportation fund and are not, as Delta has

asserted, to be restricted to only road use.

Our interpretation of this statute as an excise tax is consistent with prior United States Supreme Court decisions which reviewed similar statutes dealing with taxes on fuel used by airlines.

In 1933 the United States Supreme Court was faced with a challenge to a Tennessee statute which imposed an excise tax on the privilege of selling, storing, or distributing gasoline within the state. Nashville, Chattanooga, & St. Louis Railway v. Wallace, 288 U.S. 249 (1933). The proceeds of the tax were to be used solely in the construction and maintenance of a highway system in the state. The

appellant rail carrier contended that the tax was in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier and, thus, an unconstitutional burden on interstate commerce. Id. at 737. The court noted that gasoline having come to rest in storage is taxable by the state, notwithstanding its prospective use as an instrument of interstate commerce, much the same as a right of way, rolling stock, or other instruments of interstate commerce are subject to local property taxes. Accordingly, the Court stated:

> [T]here can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbid-

> den in Helson v. Kentucky, supra. Here the tax is imposed on the successive exercise of two or those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and reremote from the function of interstate commerce itself to transgress constitutional limitations. . . .
>
> . . . [T]he levy is a tax, not a toll or charge for use of the highways. . . .

Id. at 268.

In Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147 (1981), the Supreme Court upheld a state tax on the sale of gasoline within the state. The suit was brought by an interstate air carrier which argued that the tax placed a

direct burden on interstate commerce. The Court found that the tax, which was described in the statute as a license tax, was for the privilege of carrying on the business of selling gasoline. The Court emphasized that under the circumstances the validity of the tax would not be affected by whether the tax was construed to be an excise tax or a property tax. The Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

Id. at 153.

Similarly, the Court upheld a Wyoming Law which taxed all gasoline "used or sold" in the state and applied to all gasoline imported for use upon its withdrawal from storage tanks in Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1932). The Court described the tax in the following manner:

> The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. . . .
>
> A state may validly tax the "use to which gasoline is put in

> the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, supra. There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U.S. 245, 73 L. ed. 683, 49 S. Ct. 279." As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Id. at 252 (emphasis supplied).

The Supreme Court of the United States has stated that the constitutional power of a state to tax

does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation. Nashville, Chattanooga & St. Louis Railway v. Wallace, 288 U.S. 249, 269 (1933). A state is free to pursue its own fiscal policies, "if by the practical operation of a tax the state has exerted power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940). See also Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625 (1981); General Motors Corp. v. Washington, 377 U.S. 436, 440-41 (1964). The relevant inquiry under the

fourth prong of the Complete Auto test is not, as Delta seems to suggest, the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. Commonwealth Edison, 453 U.S. at 625. The first prong of Complete Auto clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before any tax may be levied on it. The fourth prong of the test is intended to impose the additional limitation that the measure of the tax be reasonably related to the extent of the contact. Id. at 626; Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

This tax is unlike a true "user fee" or user tax. Perhaps the best illustration of a true user tax is found in Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc., 405 U.S. 707 (1972). In Evansville-Vanderburgh the United States Supreme Court reviewed a use tax imposed on airlines by an Indiana municipality. All interstate air carriers were charged a user service charge for each enplaning passenger. The monies collected were to defray the cost of airport construction and maintenance. The tax was upheld and found to be fairly related to the use of the facilities by the airlines.

The present tax is more analogous to that found in Commonwealth

Edison where the United States Supreme Court upheld a Montana severance tax on coal. Coal producers challenged the tax contending that the severance tax had a discriminatory effect on interstate commerce since ninety percent of Montana's coal was shipped out-of-state and, therefore, the tax burden was borne primarily by out-of-state consumers. The Court found that the coal producers' claim hinged on an inquiry into the fourth prong of Complete Auto. First, the Court concluded that, contrary to appellant's contention, the severance tax was a general revenue tax. 453 U.S. at 621. The Court also concluded that the fourth prong of Complete Auto was satisfied by the Montana tax. The

Court stated:

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities.

Id. at 626 (citing General Motors Corp. v Washington, 377 U.S. at 440-41).

We believe the imposition of this excise tax on the purchase of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society. Delta operates in at least nine of the major airports throughout the state of

Florida transporting persons and property and engaging in the business of operating a commercial airline for profit. The persons and property which are transported through the air by airlines such as Delta do not come to rest at the airports. Those persons and any property generally must then use the public roads and highways of the state in automobiles or trucks or some other means of public transportation. We must disagree with delta's contention that the tax is invalid because it is not fairly related to the services provided by the state.

Accordingly, we affirm that portion of the circuit court's order which upheld section 6 of the law as not being violative of the commerce

clause. But, we reverse the circuit court's order insofar as it upheld the corporate tax credit to Florida-based airlines and strike that section of chapter 83-3.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-761 - Certified by the District Court of Appeal, First District, Case No. AT-266

J. Michael Huey and Stephen A. Ecenia of Akerman, Senterfitt and Eidson, Tallahassee, Florida, for Delta Air Lines, Inc.; and Darrey A. Davis and Juan T. O'Naghten of Steel, Hector and Davis, Miami, Florida, for Pan American World Airways, Inc.,

Appellants

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Tallahassee, Florida,

for Appellee

SUPREME COURT OF FLORIDA

No. 63,949

EASTERN AIR LINES, INC., Appellant,

v.

DEPARTMENT OF REVENUE, Appellee.

[June 14, 1984]

ADKINS, J.

The case is before us on an order from the First District Court of Appeal certifying the issues in the case to be of great public importance. We have jurisdiction. Art. v, §3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Eastern Air Lines in the circuit court of Leon

county seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the grounds that the law was unconstitutional. Specifically, Eastern alleged that the law violated the equal protection and due process clauses of the Florida and United States Constitution, was an institutional delegation of legislative authority, and violated the commerce clause of the United States Constitution. By stipulation, the parties agreed to a procedure whereby Eastern was allowed to self-accrue the sales tax imposed under chapter 83-3, which became effective on April 1, 1983, during the pendency of the proceedings subject to certain conditions.

The trial judge entered his final judgment in this case on May 27, 1983, incorporating the order he had entered in a similar action filed by Delta Airlines and upholding the constitutionality of chapter 83-3. On June 24, 1983, Eastern filed its notice of appeal with the First District Court of Appeal. On July 12, 1983, that court issued its order certifying the case for immediate resolution by this Court.

Chapter 83-3 was enacted during a special session of the Florida legislature which was called for the express purpose of addressing road transportation and public transit needs in the state. The law revises the tax structure of chapters 212 and 220 of the Florida Statutes. The new law eli-

minates one-half (4 cents) of the excise tax imposed by former chapter 206, Florida Statutes (1981), on fuel purchased for road transportation use and imposes a five percent sales tax on this fuel through the new Part II of former chapter 212, chapter 83-3, section 6. That section bases the five percent sales tax on a predetermined price for fuel of $1.148 per gallon. The new sales tax is imposed on all aviation jet fuel purchased by interstate air common carriers, but is not imposed on railroads and vessels due to the proration provision which applies to railroads and vessels allowing taxation based on cost and only on the carrier's intrastate mileage. Ch. 83-3, § 5 (amends §

212.08(4), Fla. Stat. (Supp. 1982).

Section 4 of the law provides:

> (4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.--Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

The first issue which we will address is Eastern's contention that the proration provisions, which do not

apply to airlines, violate concepts of equal protection by not treating all common carriers alike. Eastern asserts that all interstate carriers, whether they be airlines, railroads, trucks or vessels, are similarly situated for fuel tax purposes. The circuit court found that Eastern did not sustain its burden of demonstrating that the classification is hostile and oppressive and held that there "is no invidious discrimination by the creation of an arbitrary classification." The court's order states: "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to

their distinctive nature." The court cited the example of the airlines being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to chapter 80-368, Laws of Florida, while vessels and railroads are not. The court also noted that proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean to avoid the accumulation of intrastate mileage.

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated

usurpetion of power will authorize judicial interference with legislative action. Walters v. City of St. Louis, 347 U.S. 231 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. Madden v. Kentucky, 309 U.S. 83 (1940); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. Department of Revenue v. AMREP Corp., 358 So.2d 1343, 1349 (Fla. 1979). A statute that discriminates in

favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. Allied Stores v. Bowers, 358 U.S. 522 (1959).

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classification at issue could rationally be based. The modes of transportation are inherently and essentially different. The classifi-

ciation drawn does not violate concepts of equal protection.

Eastern also argues that the statute, by adopting an initially established fuel price of $1.148 per gallon upon which to base the tax rate, violates concepts of equal protection and unconstitutionally restricts the rights of individuals to contract. The provision being challenged reads as follows:

> § 212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.--
>
> (3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the recall price per gallon of motor fuel and special fuel as follows:
>
> (a) The department shall determine the appropriate total

> motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.
>
> (b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.
>
> (c) The initially established price is $1.148 per gallon.

Eastern asserts that the price set is not related to the actual price of aviation fuel and, therefore, is arbitrary and unreasonable. We do not agree. The tax is levied on first

withdrawal of the fuel from the storage tanks and is imposed on all consumers equally regardless of the nature of transport. We find no merit in Eastern's argument that the predetermined price structure invidiously discriminates against airlines.

Eastern also contends that section 6 of the law constitutes as improper delegation of legislative power by relating the price adjustment for future periods to the percentage change in the average monthly gasoline price component of the Consumer Price Index issued by the United States Department of Labor. The Consumer Price Index referred to in the law is authorized by 29 U.S.C. §§ 2, 2a and 2b (1976). Under these code provisions,

the Secretary of Labor has broad powers to collect, collate and report statistics, and, to that end, has the power to use bureaus provided for the department and is authorized to call upon other departments of the federal government for data and the results obtained by them. More importantly, the Secretary of Labor may "collate, arrange, and publish such statistical information so obtained in the same manner as to him may seem wise." 29 U.S.C. § 2. The Consumer Price Index is widely used by the federal government to determine such things as cost of living increases in social security, retirement benefits for the military, and other appropriations such as child care payments.

The circuit court in its final judgment determined that the method of appropriation in chapter 83-3 is equivalent to the method which allowed the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index and which was found to be constitutional in Gindl v. Department of Education, 396 So.2d 1105 (Fla. 1979). Eastern argues that the instant case should be distinguished from Gindl because here the Department of Revenue is delegated to determine the price upon which the tax will be based by using a federal agency's index to be adopted in the future and over which no Florida agency has any control. Eastern argues that since the depart-

ment, inarriving at the tax applicable to the price, must, of necessity, rely on an administrative act of the United States Department of Labor which will first take place on March 1, 1984, the legislature has shifted its constitutional duties to that federal agency contrary to the established rule of this state, citing as authority this Court's decision in State v. Welch. 279 So.2d 11 (Fla. 1973).

In State v. Welch, this Court considered the constitutionality of a portion of the former Florida Drug Abuse Law, chapter 404, Florida Statutes (Supp. 1972), which purported to prohibit certain acts by reference. Specifically, the law declared that it was the intent of the legislature to

include under that chapter "all drugs controlled by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law. § 404.515, Fla. Stat. (Supp. 1972). In Welch this Court looked to the rule of law announced in Freimuth v. State, 272 So.2d 473 (Fla. 1972). There, the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislature power for the legislature to adopt in advance any federal act or the ruling of any federal administrative

body that Congress or an administrative body might see fit to adopt in the future. 272 So.2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. Id.

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to

determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of Welch and Friemuth should be interpreted to apply to statutes which incorporates federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a consumer price index which is to be determined after the effective date of the act. In Gindl we upheld a

statutory provision which required a computation based on the most recent publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of

appropriation in chapter 83-3 is equivalent to the method approved in Gindl.

The final issue which Eastern has raised is whether chapter 83-3 unconstitutionally discriminates against interstate commerce since its tax credit provisions provide a direct commercial advantage to local agriculture and commercial fishing to the detriment of similar interstate activities. The relevant section of the law provides:

> § 212.92 Refunds.--
> (e) Refund to farmers and fishermen.--
>
> 1. [A]gricultural purposes means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any

vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms.

2. For the purposes of this paragraph, 'commercial fishing purposes' shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

The Department of Revenue questions Eastern's standing to

challenge chapter 83-3's full refund provision, section 212.92(1)(e), 2. & 3., since Eastern is "neither in the fishing or farming business and . . . Eastern does not contend that farmers and/or fishermen are in direct or indirect competition with their airline enterprise." Eastern does not compete with fishing or agriculture. We agree that Eastern does not have standing to raise the unconstitutionality of these full refund provisions. In State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367 (1915), this Court held that the constitutionaity of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a pro-

vision of the statute that does affect the party's rights or duties.

It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. Cramp v. Board of Public Instruction, 137 So.2d 828 (Fla. 1962).

Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. Kass v. Lewin, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in Presbyterian Homes of Synod v. Wood, 297 So.2d 556 (Fla. 1974), wherein the Court states:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the legislature would

> have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

Id. at 559.

We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Accordingly, we affirm the order of the circuit would.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD

AND SHAW, J.J., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-855 - Certified by the District Court of Appeal, First District, Case No. AT-359

Joseph F. Jennings of Kimbrell, Hamann, Jennings, Womack, Carlson and Kniskern, Miami, Florida,

for Appellant

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and

Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellee

IN THE SUPREME COURT
STATE OF FLORIDA

Case Number 64,085

NORTHEASTERN INTERNATIONAL AIRWAYS, INC. and ARROW AIR, INC.,

Appellants,

vs.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.
_____/

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that NORTHEASTERN INTERNATIONAL AIRWAYS; INC., and ARROW AIR, INC., the Appellants above, hereby appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of

Florida denying Appellants' Motions for Rehearing and affirming, in part, the Circuit Court's Judgment upholding the constitutional validity of Chapter 83-3, Laws of Florida, which Final Order was entered in this Court on September 12, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2), and a copy of this Notice of Appeal is being concurrently filed in the Circuit Court in and for Broward County, Florida.

Dated this 5th day of December, 1984.

/s/ THOMAS F. LUKEN

THOMAS F. LUKEN
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1290 E. Oakland Park Blvd.
Ft. Lauderdale, FL 33334
(305)561-9500

AFFIDAVIT OF SERVICE BY MAIL

STATE OF FLORIDA)
ss:
COUNTY OF BROWARD)

I, THOMAS F. LUKEN, depose and say that I am attorney of record for Plaintiffs/Appellants, Northeastern International Airways, Inc., and Arrow Air, Inc., and that on December 5, 1984, pursuant to the Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein as follows:

On Defendant/Appellant, STATE OF FLORIDA, DEPARTMENT OF REVENUE, by mailing copies to LARRY E. LEVY, General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida

32301; and to JOSEPH C. MELLICHAMP, Assistant General Counsel, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

All persons required to be served have been served.

/s/ THOMAS F. LUKEN
THOMAS F. LUKEN

SWORN TO AND SUBSCRIBED before me this 5 day of December, 1985.

/s/ JEAN E. FEE
NOTARY PUBLIC

PROCLAMATION

State of Florida
Executive Department
Tallahassee

TO THE HONORABLE MEMBERS OF THE FLORIDA SENATE AND THE HOUSE OF REPRESENTATIVES:

WHEREAS, the State of Florida is experiencing an accelerating deterioration of its transportation system: roads, expressways, bridges and public transit; and

WHEREAS, the cost of rebuilding Florida's roads, expressways and bridges is approximately six times greater than the cost of adequately maintaining them; and

WHEREAS, the timely and strategic construction of new transportation corridors is a primary tool for shaping patterns of orderly population growth; and

WHEREAS, the provision of adequate urban public transit facilitates an orderly growth program for Florida's urban areas and diminishes the development pressures on agricultural and environmentally sensitive land; and

WHEREAS, the provision of adequate transportation funding and planning is

a paramount factor for businesses as they decide to relocate or expand in Florida; and

WHEREAS, thousands of jobs for Floridians and millions of dollars in Florida payrolls could be lost without adequate financing for Florida's transportation needs; and

WHEREAS, the improvement of Florida's roads, bridges and highways will require increased funding and related statutory changes;

NOW, THEREFORE, I, BOB GRAHAM, Governor of the State of Florida, by virtue of the power and authority vested in me by Article III, Section 3(c)(1), Florida Constitution, do hereby proclaim as follows:

Section 1.

That the Legislature of the State of Florida is convened in Special Session commencing at noon, Tuesday, March 1, and extending through 6:00 p.m. Wednesday, March 2, 1983.

Section 2.

That the Legislature of the State of Florida is convened for the sole and exclusive purpose of considering the following matters:

(a) Amendment of Chapter 212, Florida Statutes, to remove the sales tax exemption on Motor and Special Fuel and amendment of Chapter 206, Florida Statutes, repealing the first gas tax.

(b) Amendment of Chapter 320, Florida Statutes increasing Motor Vehicle Tag fees and reallocating Motor Vehicle License Tag Revenue.

(c) Amendment of Chapter 206, Florida Statutes, to allow a local option Motor Fuel Tax.

(d) Amendment of Chapter 212, Florida Statutes, to repeal the partial exemption for fuel purchases.

(e) Amendment of those sections of Florida Statutes necessary for the implementation of the foregoing.

(f) A bill requiring a performance audit and management review of operations of the State Department of Transportation.

(g) A bill providing a repeal of Section 20.23(3), Florida Statutes, unless reenacted by October 1984 after presentation

and consideration of performance audits and management reviews.

(h) Amendment of 1982-83 General Appropriations Act.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed to this Proclamation convening the Legislature in Special Session at the Capitol, this 16th day of February 1983.

(SEAL)

BOB GRAHAM
Governor

ATTEST:

GEORGE FIRESTONE
Secretary of State